



California Fair Political Practices Commission

February 22, 1989

Rodney J. Blonien
Whitman & Ransom
1121 L Street, Suite 510
Sacramento, CA 95814

Re: Your Request For Advice
Our File No. A-89-034

Dear Mr. Blonien:

You have requested advice regarding the application of the "revolving door" provisions of the Political Reform Act (the "Act").^{1/}

QUESTION

You are a former Undersecretary of the Youth and Adult Correctional Agency (YACA). Tutor-Saliba is the principal contractor for new construction at Folsom Prison. May you engage in the following activities on behalf of Tutor-Saliba with respect to construction claims against the Department of Corrections arising after April 1, 1987:

1. Assist Tutor-Saliba in evaluating their claims and help them decide which claims to pursue and which to drop;

2. Meet with officials from the Department of Corrections and the Attorney General's office to evaluate and attempt to settle each claim and to help prepare and present Tutor-Saliba's case at arbitration.

CONCLUSION

You are precluded by the revolving door provisions of the Act from representing, aiding, advising, counseling, consulting, or assisting in representing Tutor-Saliba, for

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

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compensation, in connection with its claims against the Department of Corrections arising from the Folsom construction contract. These claims are part of the same proceeding in which you participated as a state administrative official.

FACTS

You were the Undersecretary of YACA, the state agency that oversees the Department of Corrections, from approximately December 10, 1984, until your departure on March 31, 1987. During this period, you spent a great deal of time working on various prison construction projects to see that construction schedules and environmental reviews were expedited and litigation was resolved. Tutor-Saliba was the principal contractor for the new construction at Folsom Prison. The contract for this construction was awarded through a low-bid process.

On or about August 1, 1986, the Department of Corrections and Tutor-Saliba entered into an amendment to the Folsom contract intended to expedite the construction schedule. Tutor-Saliba was paid additional money in return for relinquishing construction claims arising prior to the date of the expediting amendment. You were consulted by the Department prior to August 1, 1986, and gave your approval for the negotiations. You were not directly involved in the negotiations.

While at YACA, you met biweekly with project managers on various prison construction projects and were briefed on construction progress. These meetings often involved impediments which had arisen and which needed to be dealt with in order to get a project back on schedule. On numerous occasions, you discussed the construction progress at Folsom and Tutor-Saliba's job performance with Department staff.

Tutor-Saliba is now asking you to assist them in evaluation of their claims and to advise them as to which claims they should negotiate and which they should prepare to take to arbitration. Tutor-Saliba also wants you to represent them in meetings with the Attorney General's office and the Department of Corrections to try to settle those claims which arose after April 1, 1987.

The following additional facts were provided by you in the course of our telephone conversation of January 30, 1989. The original contract with Tutor-Saliba was awarded by competitive bidding prior to your term with YACA. The claims you would be dealing with are (1) losses incurred by Tutor-Saliba with respect to downtime when access was denied and (2) losses resulting from ambiguity in the state architect's plans. Tutor-Saliba will forego any remaining claims arising

out of the expediting amendment of August 1, 1986, so that the claims you would be dealing with would not arise from that amendment. None of the claims involved would relate to the biweekly progress meetings you conducted or decisions or determinations reached at or as a result of those meetings.

ANALYSIS

Sections 87401 and 87402 restrict the activities of former state administrative officials. These "revolving door" provisions prohibit any former state administrative official from representing, aiding, advising, counseling, consulting, or assisting in representing any person, for compensation, in connection with any judicial, quasi-judicial or other proceedings in which he participated as a state employee.

Specifically, those sections provide as follows:

Section 87401

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

Section 87402

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

Your former employment as Undersecretary of YACA makes you a state administrative official who is subject to the provisions of Sections 87401 and 87402. (Section 87400(b).) Therefore, as a former state administrative official, you are precluded from representing, aiding, advising, counseling,

consulting or assisting in representing Tutor-Saliba, for compensation, with respect to any Department of Corrections proceeding if you, in your official capacity, participated in the same proceeding with Tutor-Saliba as a specific party.

Participation

Section 87400(d) defines "participated" as meaning "to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties."

The duty statement supplied by YACA for the period from July 1, 1985 to September of 1986 includes the following as duties of the Undersecretary:

...Oversees, monitors and provides executive direction to the Prison Construction Program...

...Acts as an executive level facilitator between state agencies such as the Office of the State Architect, Department of General Services, Public Works Board, Department of Finance and other agencies in expediting matters related to prison construction... (emphasis added)^{2/}

The duty statement changed in September of 1986, but continued to show the Undersecretary as having overall responsibility for the decision-making aspects of the prison construction program.^{3/}

Although you have indicated that employees of the Department of Corrections were the ones who negotiated the 1986 expediting amendment with Tutor-Saliba, the fact that you had a supervisory position directly responsible for these activities means that, for purposes of the Act, you "participated" in the negotiation of that amendment to the construction contract. (See, Sanford Advice Letter, No. A-85-182; Chacon Advice Letter, No. A-87-197, copies enclosed.)

^{2/} Duty Statement, Under Secretary, Youth and Adult Correctional Agency, dated 7-1-85, received from YACA (copy enclosed).

^{3/} Duty Statement, Undersecretary and Chief Legal Advisor Youth and Adult Correctional Agency, dated September 1986, received from YACA (copy enclosed).

In addition to your participation in the negotiation of the expediting amendment, you also participated in the monitoring of the agreement. According to the facts presented, you were briefed on construction progress at Folsom and on Tutor-Saliba's job performance. These meetings would often involve a discussion of work schedule impediments that needed to be dealt with in order to get the project back on schedule.

Same Proceeding

The revolving door provisions of Sections 87401 and 87402 apply throughout the duration of a proceeding in which the former state administrative official participated as a state employee. However, the official is not prohibited from representing any party to the proceeding with regard to any other matter, including any new proceeding involving the same parties. (See, Sanford Advice Letter, supra, at p. 3.)

Section 87400(c) provides that a "proceeding" is "any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in any court or state administrative agency..."

In this case, you have participated in both the formation and monitoring phases of the Folsom construction contract by means of your participation in the expediting amendment and the monitoring of contract performance. You are now being asked to assist a party to that contract, Tutor-Saliba, in its claims against the Department of Corrections arising out of that contract.

In order that your representation of Tutor-Saliba not violate Sections 87401 and 87402, it would be necessary to find that each claim against the contract constitutes a new proceeding. If that were the case, you might be able to represent Tutor-Saliba with respect to those claims on the theory that you had not participated in those new proceedings.

We have previously made a distinction between the drafting and award process and the monitoring process with respect to contracts. We have treated the drafting and award process as one proceeding and the monitoring process as a separate proceeding. (See, Sanford and Chacon, supra.) However, to attempt to segment the contract monitoring process into stages of performance would ignore the inside knowledge and experience gained in dealing with one stage that must inherently transfer to another. You have--or by nature of your former supervisory position must be deemed to have--such knowledge and experience with respect to the contract with Tutor-Saliba. Since you have participated in

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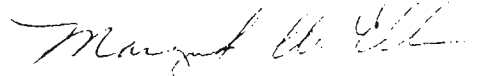
the contract monitoring process and the claims arise from this contract, such claims are part of the same proceeding in which you participated as a state administrative official. Therefore, you may not represent, aid, advise, consult or assist in representing Tutor-Saliba in connection with these claims.

Although this advice is consistent with past letters of the Commission, we anticipate that the Commission will re-examine this issue within the next year and possibly clarify the provisions of Section 87400, et seq through the adoption of regulations. Should similar situations arise in the future, we suggest that you contact us again to determine if we have changed our advice as a result of Commission hearings on the subject. We would appreciate any input that you may have on this subject.

If you have any further questions regarding this matter please contact me at (916) 322-5901.

Very truly yours,

Diane M. Griffiths
General Counsel



By: Margaret W. Ellison
Counsel, Legal Division

DMG:MWE:aa

Enclosures

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January 17, 1989

Ms. Diane Griffiths, General Counsel
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, California 95804

RE: Private Practice Consulting - Conflict of Interest

Dear Ms. Griffiths:

I would appreciate receiving an opinion from your office advising me whether or not you believe there would be a conflict of interest if I were to assist the construction firm of Tutor-Saliba negotiate and settle claims with the California Department of Corrections. As you know, I was the Undersecretary of the Youth and Adult Correctional Agency (YACA) from approximately December 10, 1984, until my departure on March 31, 1987. During this period, I spent a great deal of time working on the various prison construction projects to see that construction schedules and environmental reviews were expedited and litigation was resolved. Tutor-Saliba was the principal contractor for the construction at new Folsom. The contract for this construction was awarded through the low-bid process.

On or about August 1, 1986, the Department of Corrections and Tutor-Saliba entered into an agreement to expedite the construction schedule and Tutor-Saliba was paid additional money in return for which they relinquished their rights pursuant to construction claims which had arisen to that date. Prior to the Department of Corrections entering into this agreement with Tutor-Saliba, I was consulted and gave my approval for the Department to go forward and negotiate such an agreement with Tutor-Saliba. I, however, did not become involved in the negotiations in any manner whatsoever. Additionally, you should know that every two weeks I would meet with the project managers on the various prison construction projects, and I would be briefed on the construction progress

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and how the schedule was impacted by the events of the preceding two weeks. In the course of these meetings, we often discussed impediments which had arisen and which needed to be dealt with in order for the project to get back on schedule. On numerous occasions, while at YACA, I discussed the construction progress at Folsom and the job performance of Tutor-Saliba with the staff at the Department of Corrections.

I have been approached by Tutor-Saliba and asked to assist them in evaluating their claims and advising them which claims they should negotiate with the Department of Corrections and which they should prepare to take to arbitration. In addition, Tutor-Saliba has asked me if it would be appropriate for me to meet with officials from the Attorney General's Office and the Department of Corrections in an attempt to settle those claims which arose after April 1, 1987, which was the date upon which I departed my position at the Youth and Adult Correctional Agency.

In summary, I have been asked by Tutor-Saliba to:

1. Assist them in evaluating their claims and help them decide which claims to pursue and which to drop;
2. Actually meet with officials from the Department of Corrections and the Attorney General's Office to evaluate and attempt to settle each claim and to help prepare and present their case at arbitration;
3. Perform the above functions for only those claims which arose after my departure from the California State payroll.

Needless to say, I will appreciate your assistance in this matter with an early response.

Most cordially,



Rodney J. Blonien of
WHITMAN & RANSOM

RJB:mw

SAC1287A

FPPC

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Needless to say, I will appreciate your assistance in this matter with an early response.

Most cordially,



Rodney J. Blonien of
WHITMAN & RANSOM

RJB:mw

SAC1287A



California Fair Political Practices Commission

January 23, 1989

Rodney J. Blonien
Whitman & Ransom
1121 L Street, Suite 510
Sacramento, CA 95814

Re: 89-034

Dear Mr. Blonien:

Your letter requesting advice under the Political Reform Act was received on January 17, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margaret Ellison an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329.))

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan
Acting General Counsel

KED:plh